Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERGNAUD AIMABLE, *et al.*,
Petitioners,

v.

LONG & SCOTT FARMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under this Court's decisions an employment relationship under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") exists if, in light of the totality of the circumstances, the worker is economically dependent on the entity for whom the work is performed. This Court has also recognized that an employee may be jointly employed by two or more employers, a situation that is common in agriculture. This case presents the following questions:

1. Whether the Court of Appeals erred in holding that a fundamentally different test for economic dependency applies in a joint-employer situation as compared to a single employer situation?

2. Whether the Court of Appeals erred in holding that, in a joint employer situation, it is irrelevant that the putative joint employer indirectly controls and supervises the work unless the common law test for employment is satisfied?

3. Whether the Court of Appeals erred in holding irrelevant for purposes of determining joint employment such traditional factors as investment in equipment and facilities, opportunity for profit and loss, permanency and exclusivity of employment, and the degree of skill required to perform the job?

4. Whether the Court of Appeals erred by concluding that two important factors -- ownership of the facilities where the work occurred and performance of a specialty job integral to the business -- are to be accorded "little relative weight" in the joint employment context?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were the petitioners, Vergnaud Aimable, Alain Alcin, by and through his wife, Gerta Alcin, Gerta Alcin, Orasis Alcindor, Joseph Miguel Alcius, Jean Duson Aldreus, Alisma Altidor, Joseph Jerome Altidor, Allphonse Amilcar, Icienner Amilcar, Jean Claude Amilcar, Rose Marie Emie Anderson, Dieulila Andre, Marie Andre, Joaquin Antoine, Gabriel Artis, Joacius Auguste, Pierre Paul Augustin, Adele Avertis, Vicsamar Odimar Baptiste, Joseph Lamartine Beauvais, Gerard Belizaire, Jocelyne Bertin, Cedieu Blanc, Delva Blanc, Elisnord Blanc, Clairvenante Boulin, Denuna Boulin, Joe Louis Bridges, Lerone Buissereth, Charles Cadet, Cereste Cajuste, Jean Obnes Casimir, Jean Pierre Castil, Dumond Catul, Excelia Catul, Jerome Celestin, Marie Odmise Cesaire, Augustin Cesar, Tony Chapman, Dieuseul Charlemon, Pierre Charles, Rosette Charles, Sauveur Charles, Yvette Charles, Duversin Clairin, Fednel Clairant, Clervoyant Clenor, Presendieu Clenor, Verrilien Clerve, Marie Edite Clesidor, Tepcy Codio, Odilon Coupette, Patrick Dalge, Archange Darius, Jean Deas, Denis Decoste, Antoine Delva, Eliana Delva, Elmise Delva, Michel Demezin, Leclerc Deneus, Desio Deristin, Quisit Deshommes, Derilus Desir, Mepricia Desir, Tine Desius, Souvenance Desrosier, Joseph Andre Dessame, John Destin, Pierre Jerome Devariste, Paulette Devil, Cinetude D'Haiti, Claudette Dor, Innocent Dorcelly, Prudancia Dorcinvil, Joseph Gerard Dorlus, Germante Duvermon, Cinelia Edouard, Jacques Edouard, Delano Elisme, Frank Elizee, Lifaite Eloi, Saintervil Emilca, Donald Ernest, Vital Estefil, Louisdor Estinfil, Solange Estinfort, Dumarsaie Etienne, Wilfride Jean Eugene, Dieuseul Exantus, Joseph Exantus, Andre Sauvene Fatal, Noelcius Fenelus, Anne Marie Fils-Aime, Norvilus Fleurant, Joseph Fleurjust, Jean Lifrand Fondrose, Michael Ford, Marie Augusta Fortune, Ron Foster, Jean Sony Francois, Omilier Francois, Polinis Francois, Alize Clergemort Fritz, Sainte Rose Galiere, Paul Garcon, Murdieu Georges, Nelie Georges, Charlonet Gue, Veronique Guerrier, Freddie Halloway, Cebien Hamilear, James Edward Hanna, Ronnie Harper, Enel Henri, Annette Hopkins, Patsy Lee

Hopkins, Jimmy Lee Howard, Maxi Innocent, Philomene Isnar, Larry B. Ivory, by and through his wife, Mamie Ivory, Leroy Jackson, Jean Baptiste Jacques, Raymond Jean, Yolene Jean, Jean Paul Jean-Baptiste, Jean Pierre Jean-Baptiste, Lumenes Jean-Baptiste, Marcilien Jean-Baptiste, Saint Jean Jean-Baptiste, Charite Jean-Charles, Ismoque Jean-Louis, Marie Elene Jean-Louis, Prefet Jean-Louis, Marie Yolande Jean-Pierre, Francois Jeoboam, Celesson Jeune, Elia Johnson, Jean Moineau Joinvil, Rene Jolteus, Brenda Louise Jones, Andre Joseph, Elisabeth Joseph, Emmanuel Joseph, Francois Joseph, Julien Joseph, Kenel Joseph, Lorista Joseph, Mariciane Joseph, Paul H. Josinvil, Jean D. Juleau, Dieumarc Jules, Sylvina Juste, Jerry Lee King, Elize Labonte, Michel Laguerre, Vercilien Lamy, Christine Laurent, Audinor Laurette, Antoine Legros, Titus Ligene, Jean Baptiste Limorze, Mesius Logiste, Jean Hevil Loiseau, Carilia Lorius, Fene Louis, Francis Louis, Joseph Andreville Louis, Luckner Louis, Marie Louis, Vital Louis, Saint Pierre Lucce, Jerome Lusca, Naitil Marcelin, Jean Marius, Marie Rosana Massillon, Anouse Maxime, Vincent McBride, Marie Jyolette Meide, William Merove, Gelin Metayer, Patrick Metellus, Jean Alix Michaud, Althazar Michel, Curla Michel, Lifaite Michel, Prosper Michel, Silon Michel, Walter Michel, Rosemonde Milien, Marie Rose Mimi, Excellent Moise, Marie Anoinette Moise, Pierre Paul Mondesir, Odette Monerant, Stan Montgomery, Samuel Augustus Mowatt, Delivois Murat, Gladys Nelson, Sylvester Newsome, Arsene Nicolas, Joseph Charitable Nicolas, Joseph Lafortune Nicolas, Bazil Noel, Dieugrand Noel, Gabriel Noel, Paraces Noel-Jeune, Joseph Arnold Nonombre, Osette Omilus, Celia Pasteur, Wanel Paul, Audin Petit-Bois, Clorisma Petit-homme, Felix Petit-homme, Joseph Archange Petit-homme, Joseph Immano Petit-homme, Marie Valcemir Petit-homme, Tonton Petit-homme, Louicilien Petit-Louis, William D. Phebus, Bernadette Phicien, Carleau Pierre, Elver Pierre, Maurilus Pierre, Idana Pierre-Louis, Fitho Plantin, Marie Rose Plantin, Yvon Poucely, Tyrone Powell, Lubert Raymond, Talius Richardson, Jules Richemond, Jean Gislait Romilus, Francois Romulus, Myrtil Sagesse, Yves Saintil, Blanc Seide, Louis Seide, Camelus Severin, Jean Silverain, Rene Simeon, Gabriel St. Eloi, Milfranc

St. Fleur, Sam St. Fleurant, Andre St. Jean, Kislene St. Hubert, Marcorel St. Hubert, Lucien St. Lot, Magre St. Pierre, Petienne St. Pierre, Phito St. Pierre, Ferdinand Telemaque, St. Jean Telemaque, Clothaire Thelemaque, Marc Thelemaque, Onondieu Thelemaque, Charles Thermidor, Celina Thomas, Archibald Wilford Thompson, Charles Jean Thony, Lucnel Timoleon, Ray Tin, Phanor Toussaint, Remilus Toussaint, Timothy Tucker, Yolette Ulysse, Cilitane Valcourt, Dorvilus Vil, Fanest Vilsaint, Joseph Vincent, Billy Watson, Freddie Lee Watts, William Jerome Willingham, Willie Ray Wilson, Tommy Lee Young, and the respondent, Long & Scott Farms, Inc. (owned by William D. Long and Frank D. Scott, Jr.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 20 F.3d 434 (11th Cir. 1994). The opinion of the United States District Court for the Middle District of Florida is unreported (App. 20a).

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[1] The only corporation that is a party to this proceeding is Respondent Long & Scott Farms, Inc. Petitioners are unaware of any parent company or subsidiary of Respondent required to be listed pursuant to Supreme Court Rule 29.1.

JURISDICTION

The Court of Appeals entered its judgment on May 10, 1994. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES AND REGULATIONS INVOLVED

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, provides:

§ 203. Definitions

As used in this chapter--

* * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .

(e)(1) Except as provided in paragraphs (2), (3), (4) the term "employee" means any individual employed by an employer.

* * * *

(g) "Employ" includes to suffer or permit to work.

29 U.S.C. § 203(d), (e), (g) (1988).

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §§ 1801-1872, provides:

§ 1802. Definitions

As used in this chapter--

* * * *

(2) The term "agricultural employer" means any person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.

* * * *

(5) The term "employ" has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(g)) for purposes of implementing the requirements of that Act.

29 U.S.C. § 1802(2), (5) (1988).

The AWPA regulations, 29 C.F.R. §§ 500.0-500.271, provide:

(i) The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a *joint employment* situation does not exist.

(ii) Questions will often arise under the Act as to whether individuals employed by a farm labor contractor are also jointly employed by another person engaged in agriculture (including any person defined in the Act as an agricultural employer or an agricultural association). Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. See *Hodgson v. Okada*, 472 F.2d 965, *Hodgson v. Griffin and Brand*, 471 F.2d 235, *Mitchell v. Hertzke*, 234 F.2d 183, *United States v. Rosenwasser*, 323 U.S. 360, *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, and *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308. In determining whether such a joint employment relation exists the courts have cited the broad definition of *employ* in the Fair Labor Standards Act which *includes to suffer or permit to work*. The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:

(A) The nature and degree of control of the workers;

(B) The degree of supervision, direct or indirect, of the work;

(C) The power to determine the pay rates or the methods of payment of the workers;

(D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

(E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(i)-(ii) (1993) (emphasis in original).

STATEMENT

This case presents important questions as to the standard for joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act. The facts are essentially undisputed.

Petitioners are 206 migrant and seasonal farm workers who, at various times between 1985 and 1989, harvested crops grown by Respondent Long & Scott, Inc. ("Long & Scott").[2] Most of the Petitioners have little formal education -- many never completed intermediate school and others never completed grade school.[3]

Respondent Long & Scott owns and operates an approximately 1,200 acre vegetable farm located in Florida. (RSF1: Scott dep. 12, 104.) Frank Scott ("Scott") owns 50% of Long & Scott's stock and controls all of the day-to-day operations of the farm. (RSF2: Scott Aff. ¶ 2.)

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[2] *See generally* RSF1: Petitioners' Responses to Interrogatory No. 3. The district court docket sheet indicates that documents submitted in connection with the parties' summary judgment motions and cited herein are included in the record in two unpaginated separate files. "Separate files" number one and number two are cited as RSF1 and RSF2, respectively.

[3] *See generally* RSF1: Petitioners' Responses to Interrogatory No. 15.

1. *Background*

Long & Scott hired defendant John Miller, Jr. ("Miller"), a farm labor contractor, to recruit and furnish migrant farm workers to harvest its most labor intensive crops -- corn, cabbage, and cucumbers. (*See, e.g.*, RSF2: Miller Aff. ¶ 3.) Miller recruited Petitioners as farm workers. Some of the workers recruited by Miller to work at Long & Scott's farm stayed at a labor camp operated by Miller. Miller also provided transportation to and from Long & Scott's fields for the few workers who did not have their own transportation. (*Id.* at 123, 225.) Miller has a seventh grade education. (*Id.* at 93.)

Miller and his crews have worked for Long & Scott for twenty-five years. (RSF1: Miller dep. 25.) Miller continued to be employed even though he had a long history of labor law violations. A prior opinion of the Eleventh Circuit, *Washington v. Miller*, 721 F.2d 797, 801 (11th Cir. 1983), addressed earlier violations of the FLSA and the Farm Labor Contractor Registration Act (the predecessor to the AWPA) by Miller with respect to farm workers on Long & Scott's farm. When Miller was jailed for labor law violations, Scott made available $20,000 to bail Miller out of jail. (RSF1: Miller dep. 301.)

Long & Scott used Miller and his crews exclusively to harvest its corn, cabbage and cucumber crops. (RSF1: Miller dep. 29, Scott dep. 28, 119-20.) During the harvest season in Florida, Petitioners and Miller worked for other farmers only when such work did not interfere with Long & Scott's harvest. For example, some of the Petitioners harvested corn or cucumbers for other farmers a few days a year when Long & Scott had no work but immediately returned to Long & Scott's farm whenever Long & Scott's harvest resumed. (RSF1: Miller dep. 67-68.) Long & Scott accounted for just under fifty percent of Miller's total annual revenue and was his single largest source of revenue. (RSF2: Miller Aff. ¶43.)

None of the harvesting tasks performed by Petitioners, though physically demanding, required any special skill or training. The harvesting activity performed by Petitioners involved pulling ears

of corn, cutting cabbage or cucumbers, assembling boxes or crates, packing vegetables into the crates, and closing or stacking the crates.[4] For example, a crew of approximately sixty was needed to harvest the corn at Long & Scott's sand farm, using a "mule train" which was custom-built by Long & Scott for use on its farm. A mule train is a tractor with two wings extending across twenty-four rows. Corn was pulled off the stocks by twenty-four pullers and placed on a conveyor belt. The crew for the corn harvest also included (1) packers who packed the corn in boxes, (2) a checker who recorded the number of boxes filled by each packer, (3) workers who assembled boxes, (4) closers who closed the boxes, (5) workers who pushed empty boxes to the packers or full boxes down the conveyor belt, and (6) stackers who stacked the boxes on the truck. (RSF1: Miller dep. 56-67.)

The amount of work available to Petitioners was controlled by Long & Scott. Long & Scott unilaterally decided what crops to plant, when to plant, and which plots to plant first. (RSF1: Scott dep. 35, 93, 98, Miller dep. 128-29, 200.) Long & Scott checked on the crops on a regular basis and in consultation with Miller decided when to harvest and what specific blocks to harvest each day. (RSF1: Miller dep. 73-75, Scott dep. 35.) Miller daily received instructions from Scott regarding which blocks to pick and, whenever Miller picked a block of corn without Scott's approval, Miller was "ba[w]led out." (RSF1: Miller dep. 148-49.) Whenever Scott requested that a certain acre be harvested, that portion of the field was harvested even if Miller disagreed. (RSF1: Miller dep. 200.)

In addition to directing the harvest, Long & Scott exercised substantial control indirectly over Petitioners' other activities through Miller. Thus, for example, Scott supervised the grading of vegetables to make sure the job was done right, Scott notified Miller if a worker was not doing a good job or if too many undersized cucumbers were being picked, and Petitioners could

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[4] RSF1: Miller dep. 185-86, 194-95, 229-33, Scott dep. 120-21.

not weed the cucumber fields unless Miller first consulted and received Scott's approval.[5]

Long & Scott also exercised some direct supervision over Petitioners. For example, Petitioner Tommy Lee Young stated that there was "a man from the company who came out to the fields every day and told us what to do, including what to cut and how to pack. He spoke to me personally on several occasions." (RSF1: P.M. Exh. 4 (Answer of Young to Interrogatory No. 16).) More than thirty other Petitioners submitted similar statements. (*See generally* RSF1: P.M. Exh. 4.)

Long & Scott compensated Miller on a piece-rate basis, and Miller, in turn, compensated virtually all of the Petitioners on a piece-rate basis. For instance, Long & Scott paid Miller a flat rate per crate of corn. (RSF1: Scott dep. 109.) Out of the $1.00 per crate of corn Miller received, he paid the pullers $0.20 per crate to be divided twenty-four ways and paid the other field workers varying piece rates depending upon the task. (RSF1: Miller dep. 107.)

The piece rates paid to Miller by Long & Scott were set at the beginning of each season and did not fluctuate with the market. (RSF1: Miller dep. 288-89.) Neither Miller nor the Petitioners bore any market risk; that risk was borne by Long & Scott. (*Id.*) While the market price for the produce harvested by Petitioners might fluctuate substantially during the course of the season, Miller and the Petitioners were paid regardless of changes in the price or the ability of Long & Scott to sell the produce. (RSF1: Scott dep. 62-63, 84-85, 114.) Likewise, except in rare instances, Petitioners and Miller were paid for their work notwithstanding problems with the crop (*e.g.*, rejection of corn by federal inspector due to worms). (*See, e.g.*, RSF1: Scott dep. 126-28.)

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[5] *See, e.g.*, RSF1: Scott dep. 79-81, Miller dep. 243-46; RSF2: Miller Aff. ¶ 31.

The rates paid to Petitioners were increased only when Long & Scott agreed to raise the rates paid to Miller. (RSF1: Miller dep. 106, 107, 191.) When Miller sought increases in his per unit rate of compensation, he justified the requests by mentioning to Scott the need to increase wages paid to the workers and the rising costs of providing housing to the workers. (RSF1: Scott dep. 118.)

Long & Scott owned all substantial equipment and facilities used in connection with the harvest activity performed by the migrant farm workers. The items furnished by Long & Scott included: (1) the mule train, which was custom built by Long & Scott and driven by its mechanic, Larry Petty; (2) the tractor and trailer used to haul boxes and crates to the fields; (3) the cucumber buckets and bins used by pickers; (4) the crates and boxes into which the vegetables were packed; (5) the pallets on which the grading crew stacked the crates and boxes; (6) the forklifts, all of the grading equipment and the three large flatbed trucks used to transport the crops from the field; and (7) the packing/grading shed and the pre-cooler.[6] Miller, on the other hand, supplied but a small number of hand tools used to harvest Long & Scott's crops.[7]

In addition to furnishing the equipment and machinery essential to the harvest, Long & Scott was responsible for maintenance and the cost of operation. (RSF1: Scott dep. 106, 145, Miller dep. 103-04.) Long & Scott also provided Miller with free office space located on its property near the grading shed from which he paid out wages to the farm workers. (RSF1: Miller dep. 135-36.)

2. *Proceedings Below*

When Petitioners were not paid minimum wages, they brought suit against Long & Scott and Miller alleging that they were both

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[6] *See* RSF1: Scott dep. 74, 75-76, 86-88, 99-101, 120-21; Miller dep. 103-04, 185-86, 187, 196, 232, 286-87.

[7] RSF1: Scott dep. 120, 131, Miller dep. 256.

liable as joint employers for violations of the minimum wage and recordkeeping provisions of the FLSA and AWPA statutes.[8] Following cross-motions for summary judgment on the issue of joint employment, the District Court held that Miller was Petitioners' sole employer and that Long & Scott was not a joint employer. App. 24a. Contrary to forty-five years of Supreme Court precedent, the District Court held that "economic reality" is *not* the ultimate test for employment relationships under the FLSA because "the workers are always dependent on the farmer in an economic sense . . . ." App. 24a. Accordingly, the District Court considered only the common law tests for employment -- indicia of direct control and supervision -- and refused to consider the totality of the circumstances. The District Court concluded that only Miller and not Long & Scott was Petitioners' employer. App. 24a.

On appeal, the Eleventh Circuit treated the joint employment determination as a question of law and "analyze[d] *de novo* each of the eleven factors" at issue. App. 9a. Purporting to eschew "common law definitions," the Court of Appeals recognized that the "'economic reality' of all the circumstances" is indeed the basic test for joint employment (App. 7a), and acknowledged that "[f]acially, appellants [sic] argument is attractive . . . ." App. 18a. However, the Court proceeded to place emphasis on the direct and narrow aspects of control and supervision that guided the common law approach to employment. Affirming the District Court's ruling, the Court of Appeals held that the test to be applied in joint employer cases differs from that applied in single employer cases in two fundamental respects. *First*, the Eleventh Circuit held that four traditional factors probative of economic dependence and employment relationships "are of no value to

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[8] More specifically, Petitioners' complaints alleged that both Long & Scott and Miller violated two provisions of the FLSA, 29 U.S.C. §§ 211, 206(a) (1988 & Supp. IV 1992), and multiple provisions of the AWPA, including 29 U.S.C. § 1821(a),(d)(1)-(2),(e), § 1822(a), § 1831(c)(1)-(2), § 1832(a), § 1841(b)(1)(A) & (C) (1988). Additionally, certain other claims were made only against Miller.

joint employment determinations" (App. 18a) -- investment in equipment and facilities, the workers' opportunity for profit and loss, the permanency and exclusivity of the employment, and the degree of skill required to perform the job. *Second*, the Court held without explanation that "little relative weight" (App. 19a) should be assigned to two other factors traditionally considered important by this Court and other Courts of Appeals -- ownership of the facilities where the work is performed and performance of a specialty job integral to the business. Like the District Court, the Court of Appeals therefore concluded that Petitioners were employed only by Miller and not Long & Scott.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning the scope of the joint employer doctrine in agriculture under the FLSA and the AWPA. The FLSA broadly defines "employ" as "including to *suffer or permit to work*." 29 U.S.C. § 203(g) (1988) (emphasis added). As recognized by this Court, "[a] broader more comprehensive coverage of employees within the stated categories would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see also Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992). The breadth with which the FLSA defines the employment relationship is consistent with its purposes of eliminating "low wages and long hours" and of freeing "commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); 29 U.S.C. § 202 (1988).

In accordance with the FLSA's broad definitions and remedial purposes, the common law control test has been flatly rejected.[9]

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[9] *See, e.g., Rutherford Food Corp.*, 331 U.S. at 729 (concept of employment under FLSA is broader than at common law); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299 (5th Cir. 1975) ("The terms 'independent contractor,' 'employee', and 'employer' are not to be construed in their common law senses when used in federal social welfare legislation."); *see also United States v. Silk*, 331 U.S. 704, 713

Instead, the employment relationship for purposes of the FLSA is an economic dependency test that looks to the totality of the circumstances.[10]

Joint employment relationships have long been recognized under the FLSA.[11] Under FLSA regulations, "[a] single individual may stand in the relation of an employee to two or more employers at the same time"; a joint employer relation is deemed to exist when "employment by one employer is not completely disassociated from employment by the other employer(s)"; and a joint employment determination "depends upon all the facts in the particular case." 29 C.F.R. § 791.2 (1993).

The AWPA expressly incorporated the FLSA's broad definition of "employ." 29 U.S.C. § 1802(5). The reason for incorporating that definition is unmistakable:

> The Committee's use of this term was deliberate and done with the clear intent of adopting the "joint employer" doctrine as a central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of

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(1947) (rejecting common law control test [Social Security Act]).

[10] *See Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961) ("economic reality" rather than "technical concepts" is the test of employment); *Rutherford Food Corp.*, 331 U.S. at 730 ("[T]he determination of the [employment] relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity."); *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.").

[11] *See, e.g., Rutherford Food Corp.*, 331 U.S. 722; *Falk v. Brennan*, 414 U.S. 190 (1973); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973); *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973).

migrant and seasonal workers and those liable for any breach of those duties.

H.R. Rep. No. 885, 97th Cong., 2d Sess. at 6, *reprinted in* 1982 U.S.C.C.A.N. 4547, 4552 ("1982 H.R. Rep."). The AWPA regulations make explicit that "*[j]oint employment* under the Fair Labor Standards Act is *joint employment* under the [AWPA]." 29 C.F.R. § 500.20 (h)(4). "[J]oint employment relationships are common in agriculture and have often been addressed by the Federal courts." *Id.* § 500.20(h)(4)(ii).

I. IN APPLYING A FUNDAMENTALLY DIFFERENT EMPLOYMENT TEST IN A JOINT EMPLOYER SITUATION VERSUS A SINGLE-EMPLOYER SITUATION THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The decisions of this Court and other Courts of Appeals establish that the same test applies to determine economic dependence and the existence of an employment relationship in both single and joint employer situations, i.e., whether, in light of the totality of the circumstances, the workers are economically dependent upon one or more putative employers.[12] The factors

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[12] *See, e.g., Falk v. Brennan*, 414 U.S. at 195; *Rutherford Food Corp.*, 331 U.S. at 730; *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987) (employment under FLSA), *cert denied*, 488 U.S. 898 (1988); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-29 (5th Cir. 1985) (employment under FLSA); *Castillo v. Givens*, 704 F.2d 181 (5th Cir.) (same), *cert. denied*, 464 U.S. 850 (1983); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754-56 (9th Cir. 1979) (same analysis for sole employer and joint employer); *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38 (FLSA joint employment case); *Antunez v. G&C Farms*, 126 Lab. Cas. (CCH) ¶ 33,015 at 46,173 (D.N.M. 1993) (joint employment case under FLSA and AWPA); *Monville v. Williams*, 107 Lab. Cas. (CCH) ¶ 34,979 at 42,253-54 (D. Md. 1987) (employment under FLSA); *Haywood v. Barnes*, 109 F.R.D. 568, 587 (E.D.N.C. 1986) (joint employment under FLSA and

or indicia of economic dependence and employment applied by this Court and other Courts of Appeals in these decisions include: (1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine pay rates or methods of payment; (4) the right, directly or indirectly, to hire, fire, or modify employment conditions; (5) preparation of payroll and payment of wages; (6) ownership of property or facilities where the work occurred; (7) performance of a specialty job within the production line integral to the business; (8) investment in equipment and facilities; (9) opportunity for profit or loss; (10) permanency and exclusivity of employment; and (11) degree of skill required to perform the job.

The Eleventh Circuit decision holds that a fundamentally different test is to be used in the joint employer context. For example, while acknowledging the relevance of all factors in the single employer context, the Eleventh Circuit held that the last four factors listed above "are of no value to joint employment determinations" and that the two immediately preceding factors are to be accorded "little relative weight." App. 18a, 19a. The view that a different test applies to joint employment has been explicitly rejected by this Court and other Courts of Appeals.

In *Rutherford Food Corp.*, for example, a slaughterhouse contracted with an independent contractor to debone beef, and the independent contractor, in turn, hired individual deboners to perform the work. Under the agreement with the slaughterhouse, the independent contractor had "complete control over the other boners, who would be his employees," and the deboners used their own tools. 331 U.S. at 725. In deciding whether the workers were employed solely by the chief deboner or jointly by the slaughterhouse, the Court followed the test applied in single employer cases and looked to "the circumstances of the whole activity." *Id.* at 729-30. Since the workers performed a specialty

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AWPA); *Maldonado v. Lucca*, 629 F.Supp. 483, 487-88 (D.N.J. 1986) (joint employment under FLSA).

job which was "a part of the integrated unit of production," the employment occurred on the premises of the slaughterhouse, the workers profited from efficiency rather than by judgment or initiative, and the slaughterhouse managers quietly "kept close touch on the operation," the Court held that the slaughterhouse jointly employed the deboners. *Id.* at 730.

Nowhere in *Rutherford Food Corp.*, a case repeatedly cited as setting the standard for joint employment,[13] did the Court indicate that the appropriate test for joint employment is any different from that applied in the single employer situation. Other decisions of this Court implicitly hold that there is a uniform test for employment and implicitly reject a separate and different analysis for joint employment. *See, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (in discussing whether Greyhound was a joint employer of cleaners employed by a cleaning contractor for purposes of the National Labor Relations Act, the Court explained that the joint employment analysis is "unaffected by any possible determination as to [the cleaning firm's] status as an independent contractor"); *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (real estate management company and owners of apartment complexes jointly employed maintenance personnel).

As far as Petitioners are aware, before the Eleventh Circuit's decision, every Court of Appeals that had decided a joint employer case had applied the same test that was used in single employer cases, and not a single Court of Appeals had created a different test for joint employment cases. For example, in *Wirtz v. Lonestar Steel Co.*, 405 F.2d 668 (5th Cir. 1968), the Fifth Circuit considered whether a steel mill operator who utilized

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[13] *See, e.g., Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237; *Howard*, 852 F.2d 101, 105 (4th Cir. 1988); *Real*, 603 F.2d at 754-55; *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968); *Antunez*, 126 Lab. Cas. (CCH) at 46,174; *Haywood*, 109 F.R.D. at 585-87; *Maldonado*, 629 F.Supp. at 487; *Leach v. Johnston*, 812 F.Supp. 1198, 1206 (M.D. Fla. 1992).

independent contractors to haul iron ore from its mine to its plant was the joint employer of the individual haulers for purposes of the Social Security Act. While not finding joint employment, the court expressly held that the same standards and factors were equally relevant in "[c]onsidering whether a person or corporation is an 'employer' or 'joint employer.'" *Id.* at 669.

The Fifth Circuit has specifically held that the *Lonestar* approach applies to FLSA joint employment cases in agriculture. In *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973) a joint employment case cited with approval in both the legislative history of the AWPA and in the AWPA regulations themselves,[14] the court held that a fruit and vegetable farmer was the joint employer of harvest workers recruited by a crewleader. The court based its determination on the five factors applied in *Lonestar* and described the *Lonestar* test as "the proper approach to be taken" in assessing joint employment status. 471 F.2d at 237-38. Numerous other Courts of Appeals and District Courts have applied the single employer test in joint employer cases and have used one or more of the eleven factors listed above to judge economic dependency.[15]

The FLSA and AWPA regulations both confirm that a joint employment determination "depends upon *all* the facts in the particular case." 29 C.F.R. § 791.2 (emphasis added); 29 C.F.R. § 500.20(h)(4)(i) (same). While the AWPA regulations specifically enumerate the first five of the eleven factors identified above, the regulations state that the relevant factors "include, *but*

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[14] 1982 H.R. Rep. at 7; 29 C.F.R. § 500.20(h)(4)(ii).

[15] *See, e.g.*, *Real*, 603 F.2d at 754-57 (9th Cir.); *Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38 (5th Cir.); *Lone Star Steel Co.*, 405 F.2d at 669 (5th Cir.); *Howard*, 852 F.2d at 104-05 (4th Cir.); *Okada*, 472 F.2d at 968-69 (10th Cir.); *Antunez*, 126 Lab. Cas. (CCH) at 46,174 (D.N.M.); *Leach v. Johnston*, 812 F.Supp. at 1207 (M.D. Fla.); *Haywood*, 109 F.R.D. at 587 (E.D.N.C.); *Maldonado*, 629 F.Supp. at 487-88 (D.N.J.).

are not limited to," the five listed factors. *Id.* § 500.20(h)(4)(ii) (emphasis added). The AWPA regulations expressly approve cases that hold that the same standard applies in single and joint employer cases. *Id.*[16]

The Eleventh Circuit's decision conflicts with the foregoing decisions because it applies a test in joint employer cases that fundamentally differs from the test in single employer cases. In view of the conflict caused by the Eleventh Circuit's radical departure from the long-accepted unified test, this Court should grant certiorari.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS BY HOLDING THAT INDIRECT CONTROL AND SUPERVISION ARE IRRELEVANT IN A JOINT EMPLOYMENT CONTEXT.

The Eleventh Circuit held that the control and supervision factors set forth in the AWPA regulations in a joint employer situation are limited by the traditional common law "control" test and are satisfied only if there is "direct" control and "continuous" supervision. App. 9a-12a. By requiring direct control and continuous supervision, the Eleventh Circuit's decision conflicts with decisions of this Court and other Courts of Appeals.

The Eleventh Circuit recognized that the undisputed record in this case established that (i) the grower retained sole control over all planting decisions -- decisions that determined the nature and amount of work available; (ii) the grower specifically directed the farm labor contractor as to when to harvest and which parcels of

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[16] The difference between a single and joint employment relationship is that where the responsibilities of the employer are shared between two entities, neither will exercise all the prerogatives of an employer. Thus joint employer status exists where some, but not all of the relevant factors are present.

land to harvest; and (iii) the grower directed the contractor with respect to the specific activities of the workers.[17] App. 9a-11a.

The Eleventh Circuit dismissed the foregoing facts as evidencing "abstract notions of control," holding that "the focus is more properly limited to specific indicia of control" such as "*direct* employment decisions." App. 10a (emphasis added). The court also stated that "agricultural decisions -- decisions which only *indirectly* affected the number of workers necessary to harvest the land -- cannot be likened to 'control' in the FLSA/MSAWPA sense." App. 10a (emphasis added). Instead, the court explained, "[c]ontrol arises . . . when the farmer goes beyond general instructions . . . and begins to assign specific tasks, to assign specific workers, or to take an *overly* active role in the oversight of the work." App. 11a (emphasis added).

The Eleventh Circuit similarly limited the supervision factor. The court apparently accepted that Long & Scott "oversaw each day's production (as well as the post-picking task of grading the vegetables)," App. 11a, but the court characterized this as "minimal oversight" and believed that an employer must provide more specific "direction to appellants' work." App. 12a. In other words, the grower must engage in "direct and continuous supervision"; "infrequent assertions of oversight [by the grower] do not rise to the level of supervision necessary to satisfy this factor." App. 12a.[18]

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[17] In acknowledging these facts, the Eleventh Circuit undercuts its own conclusions that Miller "exercised absolute, unfettered, and sole control over appellants and their employment" (App. 10a), and that Miller was responsible for "the majority of picking decisions" (App. 11a).

[18] Similarly, in discussing the wages factor the court rejected plaintiffs' argument that Long & Scott "indirectly controlled" the workers' pay rates or methods of payment even though the plaintiffs showed that Miller's compensation -- and therefore the workers' wages -- were dependent upon the rates Long & Scott paid to Miller. App. 12a-14a. The court hypothesized that "even if Long & Scott were to pay Miller

The Eleventh Circuit's definitions of the terms "control" and "supervision" in the "FLSA/MSAWPA sense" conflict with decisions of this Court. This Court has held repeatedly that a central feature of the FLSA is its repudiation of the common law's direct "power of control" test and its shift to economic dependence. *United States v. Silk*, 331 U.S. 704, 713, (1947); *see also Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. at 1349-50; *Goldberg v. Whitaker House Cooperative Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp.*, 331 U.S. at 729. By incorporating the FLSA's broad definition of "employ" into the AWPA, Congress unequivocally expressed its intent that the employment relationship *not* be construed in its "limiting common law sense," and made "clear that it is economic reality, not contractual labels, nor isolated factors which is to determine employment relationships under this Act." 1982 H.R. Rep. at 6, 7. Accordingly, this Court has held that the control and supervision factors under FLSA and AWPA do not require proof of control or supervision in the common law sense.

While the Court below and the Sixth Circuit[19] have adopted a contrary view in construing the control and supervision factors, numerous other Court of Appeals decisions have also treated direct control and continuous supervision as unnecessary and have focused instead on the "all pervasive determinant economic depen-

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more money (with the intent that Miller use the extra money to increase appellants' wages), Miller would have been free to retain the increase." App. 13a. This approach deemphasizes "economic reality" -- even disparages it as from the "Euclidian world" (App. 13a) -- and accords undue significance to the power to set the specific terms of the direct disbursements to the workers. Indeed, the undisputed facts confirmed that Miller never raised Petitioners wages *unless* Long & Scott increased the rates paid Miller. (RSF1: Miller dep. 106-07, 191.) Given the premise that Long & Scott did not pay the workers directly, the court mistakenly deduces that "Miller possessed exclusive control over appellants' compensation, and appellants were economically dependent solely on Miller." App. 13a.

[19] *Donvan v. Brandel*, 736 F.2d 1114, 1119 (6th Cir. 1984).

dence." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1310 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976). In *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (9th Cir. 1979), the Ninth Circuit held that the putative employer, DSA, "effectively, though *indirectly*, controls certain important decisions in growing the strawberries, including the spacing of the plants, [and] when and how much fertilizer is to be applied." *Id.* at 756 (emphasis added). It also noted that "DSA may *ultimately* determine the amount the appellants are paid for their labor." *Id.* (emphasis added). Similarly, the Tenth Circuit in *Hodgson v. Okada*, 472 F.2d 965 (10th Cir. 1973), ruled that "the Okadas were employers of the farm workers because they were acting directly *or indirectly* in the interest of an employer." *Id.* at 969 (emphasis added). Likewise, the Fifth Circuit does not require control and supervision of the "details" of the work and finds a farmer's overall control over an integrated farming operation, including control over planting, and when, where and how much to harvest, to be probative of economic dependence. *Castillo v. Givens*, 704 F.2d 181, 189 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985).[20] Other courts have also found this same sort of indirect control and supervision to be significant in finding the existence of an employment relationship.[21]

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[20] *See also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060 (2d Cir. 1988) ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); *Castillo*, 704 F.2d at 190 ("This Court has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship, *e.g.*, the right to set hours, hire and fire, or determine wages.").

[21] *See, e.g., Lauritzen*, 835 F.2d at 1536 (7th Cir.); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 549-50 (8th Cir. 1952); *Cavazos v. Foster*, 822 F.Supp. 438, 440, 442 (W.D. Mich. 1993); *Leach*, 812 F.Supp. at 1207 (M.D. Fla.); *Monville v. Williams*, 107 Lab. Cas. (CCH) at 45,253 (D. Md.); *Donovan v. Gillmor*, 535 F.Supp. 154, 161 (N.D. Ohio 1982), *appeal dismissed*, 708 F.2d 723 (6th Cir. 1982);

The Eleventh Circuit's focus and emphasis on *direct* control and continuous supervision in a case involving unskilled labor and piecework is particularly indefensible. "Piecework in itself makes pointless much of the control which normally would be exercised over employees paid by the hour," because the pay system itself is designed to motivate the workers to pick quickly and with care. *Fahs v. Tree-Gold Co-op Growers of Florida, Inc.*, 166 F.2d 40, 44 (5th Cir. 1948); *see also Castillo*, 704 F.2d at 189 n.17 ("it is the nature of the farming business that the farmer has to depend on his workers -- the farmer cannot be in the fields supervising at all times").

By insisting on direct control and continuous supervision, the Eleventh Circuit has rendered a decision that conflicts with longstanding decisions of this Court and of numerous Courts of Appeals.

Mendez v. Brady, 618 F.Supp. 579, 582 (W.D. Mich. 1985). In *Antunez*, for example, the court emphasized the following facts:

> G&C Farms exercised tremendous control over the farming operation and the farm workers. In addition to deciding when and how much chile to plant, when to thin, irrigate and spray pesticides, and when to harvest, Gary Riggs determined the picking specifications that the workers were to follow. He also determined how much chile would be picked each day. Gary Riggs or Duane Riggs informed the labor contractors what fields needed to be harvested, how many boxes needed to be filled and whether poor quality chile or debris was being picked.

126 Lab. Cas. (CCH) ¶ 33,015 at 46,175 (D.N.M. 1993).

III. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS IN REJECTING FOUR TRADITIONAL FACTORS PROBATIVE OF ECONOMIC DEPENDENCE AND ACCORDING OTHERS "LITTLE RELATIVE WEIGHT."

A. The Eleventh Circuit's Rejection Of Four Relevant Factors Creates A Substantial And Irreconcilable Conflict.

The Eleventh Circuit also held that four specific factors -- factors traditionally applied by this Court and other Courts of Appeals to test whether an employee is economically dependent upon a putative employer -- are irrelevant and of "no value to joint employment determinations." App. 18a. The factors discarded by the Eleventh Circuit are: (i) investment in equipment and facilities; (ii) opportunity for profit and loss; (iii) permanency and exclusivity of employment; and (iv) the degree of skill required to perform the job. App. 15a-17a.

The Eleventh Circuit's repudiation of these four factors conflicts with prior decisions of this Court which specifically recognize the relevance of each of the four rejected factors in analyzing employment relationships. *See, e.g., Rutherford Food Corp.*, 331 U.S. at 730 (discussing opportunity for "profits" in relation to "initiative, judgment or foresight" versus the "efficiency" associated with "piecework" in finding that beef deboners hired by independent contractors were jointly employed by slaughterhouse); *see also, Silk*, 331 U.S. at 716 (identifying "opportunities for profit or loss, investment in facilities, permanency of relation and skill required" as among the relevant factors); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (recognizing all four factors repudiated by Eleventh Circuit as relevant to economic dependency). The Eleventh Circuit's refusal to consider such factors simply cannot be squared with this Court's decisions applying these same factors in joint employment cases such as *Rutherford Food Corp.*

The Eleventh Circuit's rejection of the foregoing factors also directly conflicts with decisions of the Ninth, Fifth and Fourth Circuits expressly recognizing the relevance of these four factors in joint employment cases. In *Real*, 603 F.2d at 757, the Ninth Circuit considered each of the four factors in holding that a supplier of strawberry plants and the owner of the farm jointly employed the farm labor workers.[22] Notably, the *Real* decision is cited favorably in the AWPA joint employment regulations. 29 C.F.R. § 500.20(h)(4)(ii).

Similarly, the Fifth Circuit in *Fahs*, 166 F.2d at 45, applied each of these four factors in holding that workers who assembled, labelled, and loaded fruit boxes were jointly employed by the packing house and the independent contractor who hired them. In the leading Fourth Circuit case, *Howard v. Malcolm*, 852 F.2d 101, 104-05 (4th Cir. 1988), the court held that, under the facts of that case, there was no joint employment relationship but also held that each of the four factors rejected by the Eleventh Circuit were relevant to the joint employment analysis.

The Eleventh Circuit's decision is also at odds with many District Court decisions applying these factors in joint employment cases. In *Haywood*, 109 F.R.D. at 587-92, a case very similar to this case, the Court analyzed each of these four factors and held that the owners and operators of a farm and the farm labor contractor were joint employers of the farm workers under the AWPA. Again, in *Antunez v. G&C Farms*, 126 Lab. Cas. (CCH) ¶ 34,979 at 42,253 (D.N.M. 1993), the Court considered each of these factors in holding that a farmer and farm labor contractor jointly employed farm workers for purposes of the AWPA and FLSA. The rejection of the four factors also conflicts with Court of Appeals and District Court decisions from virtually every circuit applying each of these factors in single

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[22] The *Aimable* court mistakenly states that joint employment was not at issue in *Real*. App. 15a. In fact, joint employment (in addition to single employment) was at issue and addressed in the Ninth Circuit's opinion. *Real*, 603 F.2d at 755-56.

employer cases to evaluate economic dependency and determine whether an employment relationship exists.[23]

There is no logical basis for the Eleventh Circuit to disregard the four factors in a joint employment context. Each of those factors is probative of economic dependency and the existence of an employment relationship. A worker who supplies his own equipment used to perform work is more self-sufficient than a worker who depends on equipment provided by a putative employer. Where two putative joint employers provide the equipment and facilities, the worker is dependent upon more than one person and remains economically dependent upon the combined capital investment of the two. A farm worker is even more economically dependent upon a grower for work and wages where the grower, as here, retains the risk of profit and loss, and the workers perform unskilled physical labor. Finally, economic dependency is magnified where, as here, seasonal harvest work is "largely . . . exclusive." (App. 16a.)

The Eleventh Circuit's repudiation of the four factors cannot be squared with prior decisions of this Court and decisions from numerous other circuits. The petition should be granted to resolve the resulting decisional conflict.

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[23] *See, e.g., Brock v. Superior Care*, 840 F.2d at 1058-59 (2d Cir.) (applying each of the four factors rejected by Eleventh Circuit); *Martin v. Selker Brothers, Inc.*, 949 F.2d 1286, 1293-96 (3d Cir. 1991) (same); *Thomas v. Brock*, 617 F. Supp. 526, 534-35 (E.D.N.C. 1985) (same) *aff'd in relevant part*, 810 F.2d 448 (4th Cir. 1986); *Usery v. Pilgrim Equipment Co.*, 527 F.2d at 1311-15 (5th Cir.) (same); *Brandel*, 736 F.2d at 1117-20 (6th Cir.) (same); *Lauritzen*, 835 F.2d at 1535-38 (7th Cir.) (same); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d at 549-50 (8th Cir.) (same); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370-73 (9th Cir. 1981) (same); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (same); *Cavazos*, 822 F. Supp. at 442 (W.D. Mich.) (same); *Aviles v. Kunkle*, 765 F. Supp. 358, 363 (S.D. Tex. 1991) (same), *vacated for lack of personal jurisdiction*, 987 F.2d 201 (5th Cir. 1992); *Mendez v. Brady*, 618 F.Supp. at 582 (W.D. Mich.) (same).

B. The Decision Below Conflicts With Decisions Of This Court And Other Courts Of Appeal By According "Little Relative Weight" In The Joint Employment Context To Ownership Of The Premises And Performance Of Work Integral To The Business.

The Eleventh Circuit acknowledged that two other factors -- ownership of the property or facilities where the work occurred and performance of a specialty job integral to the business -- indisputably favored Petitioners. App. 17a-18a.[24] Nonetheless, without citation to authority or explanation, the court below held that these two factors "bear little relative weight." App. 19a. The Eleventh Circuit's treatment of these two factors is in stark conflict with decisions of this Court and other Courts of Appeals.

First, in assigning relatively little weight to facilities and premises ownership, the Eleventh Circuit's decision conflicts with decisions of this Court and other Courts of Appeals which have considered this factor to be significant when considered in light of the totality of the circumstances. For example, in *Rutherford Food Corp.*, 331 U.S. at 730, one of the factors specifically considered by this Court in finding the slaughterhouse to be an employer was the very fact that the "premises and equipment" used for the work were owned by the slaughterhouse. This factor has also been considered pertinent in numerous decisions by other courts with no indication that it is to be accorded little relative weight. *See, e.g., Griffin & Brand of McAllen, Inc.*, 471 F.2d at 237-38; *see also Haywood*, 109 F.R.D. at 587-88.

Second, while the Eleventh Circuit assigns "little relative weight" to performance of a specialty job integral to the business, this Court and other Courts of Appeals consider this factor to be of paramount importance. For example, in *Rutherford Food Corp.*, a primary consideration relied upon by this Court in

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[24] "There is no dispute that appellants worked on land owned by Long & Scott." App. 17a. "Since appellants performed a line-job integral to the harvesting and production of saleable vegetables, we conclude that this factor also supports appellants." App. 17a.

holding that the slaughterhouse was a joint employer of meat deboners hired by a contractor was the fact that the deboners "did a specialty job on the production line." 331 U.S. at 730. The Court emphasized throughout its opinion that the deboners performed a function in the middle of the overall process of slaughtering, preparing the meat for boning, packing and shipping, all of which was done by the slaughterhouse employees. *Id.* at 724-25. Consistent with this Court's approach, numerous Courts of Appeals have assigned this factor substantial weight. *See, e.g., Lauritzen*, 835 F.2d at 1537; *Beliz*, 765 F.2d at 1328; *Castillo*, 704 F.2d at 191; *Real*, 603 F.2d at 755. Thus, the Eleventh Circuit's treatment of this factor as deserving "little relative weight" conflicts with decisions of this Court and other Courts of Appeals.

IV. THIS CASE PRESENTS IMPORTANT AND RECURRENT ISSUES OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

This case is particularly appropriate for review as it presents sharply framed federal questions involving legal standards imposed by important federal statutes. As the Eleventh Circuit recognized, "the determination of joint employment is a question of law." App. 9a.

The proper test for determining joint employment status is a recurring question of great practical importance. As the AWPA regulations recognize, "joint employment relationships are common in agriculture and have often been addressed by the Federal courts." 29 C.F.R. § 500.20(h)(4)(ii).

The aggregate annual population of migrant and seasonal farm workers and their families across the country exceeds four million.[25] As was noted in 1982, when Congress adopted the AWPA, "many migrant and seasonal agricultural workers remain

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[25] United States Dep't of Health & Human Services, *Atlas of State Profiles Which Estimate Number of Migrant and Seasonal Farmworkers and Members of Their Families* at 13 (1990).

today, as in the past, the most abused of all workers in the United States." 1982 H.R. Rep. at 2. The same is true today as wrongful "withholding" of workers' pay and failure to pay minimum wages in violation of the FLSA and AWPA continue to be common.[26]

Efforts to enforce these laws against crewleaders, who are the ostensible employers, have been unsuccessful. Most are fly-by-night operators and, even if located, are effectively judgment-proof. *Report of the Comm'n on Agricultural Workers* at xxvii (Nov. 1992). The problem of abuses under the crewleader system continues to grow acute, as "[i]n recent years farm labor contractors (FLCs) increasingly have filled the role of matching seasonal workers with jobs." *Id.* at 135. The facts of this case illustrate a notorious and familiar pattern: a large farm retains an individual crewleader to hire and supervise migrant workers; the crewleader, usually undercapitalized, evasive and often judgment-proof is interposed by the farmer as a legal shield against liability for minimum wage. Through this system, "the grower retains total control over the worker with no accountability." *Id.* at 150-151 (statement of Commissioner Dolores Huerta).[27]

A central purpose of the AWPA was to prevent just such "adroit schemes." *Cf. Silk*, 331 U.S. at 712. The statute that preceded the AWPA, the Farm Labor Registration Act of 1963 ("FLCRA"), guaranteed minimum wages and attempted to redress

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[26] *Report of the Comm'n on Agricultural Workers* at 47 (Nov. 1992); *see also ABA Study of Federally Funded Legal Aid for Migrant Farmworkers* 18 (June 1993) (farmers and crewleaders frequently violate federal minimum wage laws).

[27] Commissioner Huerta specifically cited the crewleader involved in this case for his role in schemes to evade responsibilities imposed by the AWPA: "Licensed contractors are some of the most notorious such as John Miller and Willie Simmons." *Report of the Comm'n on Agricultural Workers* at 150. True to form, Miller has himself recently filed for bankruptcy. *In re John Miller, Jr., Rudeen Quince Miller, Debtors*, Chapter 13, No. 94-2166-8G3 (U.S. Bankr. Ct., M.D. Fla.).

the exploitation of migrant farm workers by regulating farm labor contractors. This statute focused on "the crewleader, a middleman who recruited, transported and supervised migrant and seasonal workers and who was thought to be not only the primary violator, but the most unscrupulous." 1982 H.R. Rep. at 2. However, efforts to force crewleaders to comply with regulatory requirements including the minimum wage requirements of the FLSA were an abject failure and "many of the abuses which were the subject of the 1963 legislation . . . continued unabated." *Id.* Problems continued to arise because almost all duties under that statute "run through the farm labor contractor." *Id.*

Congress ultimately corrected these problems by repealing FLCRA, 1982 H.R. Rep. at 3-4, and enacting the AWPA. The AWPA adopted "a completely new approach" to guaranteeing the vindication of farm worker rights by shifting the focus away from the farm labor contractor and toward the grower and contractor jointly. 1982 H.R. Rep. at 2-3; *see also* 128 Cong. Rec. 26,008 (1982) (statement of Rep. Miller) ("Through the use of the concept of 'joint employer' the agricultural employer or association will, for the first time, be responsible for the protection of the workers. No longer must the migrant workers look solely to the crewleader for relief.").

The structure of the AWPA makes clear that only in unusual circumstances will farmers who receive the benefits of the work performed by those who toil in their fields not be responsible for satisfying the substantive provisions of the AWPA as well as minimum wage provisions:

> Agricultural employers will be relieved of the excessive burdens of FLCRA and will for the first time be sure of their duties to migrant workers. Agricultural employees will, in turn, know who is responsible for their protection, by fixing the responsibility on those who ultimately benefit from their labors -- the agricultural employer.

128 Cong. Rec. 23,499 (1982) (statement of Rep. Miller).

Thus, Congress specifically intended that farmers not be able to insulate themselves from obligations such as here for minimum wages by simply contracting with a farm labor contractor, even where the farm labor contractor would be an independent contractor under the common law. "[E]ven if a farm labor contractor is found to be a bona fide independent contractor, . . . this status does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer of the harvest workers and jointly responsible for the contractor's employees." 1982 H.R. Rep. at 7. The Eleventh Circuit's approach conflicts with this statutory structure by according special significance to the farm labor contractor's status as an independent contractor and making it a hurdle to overcome in order to find that a grower is a joint employer. The Eleventh Circuit's decision thus jeopardizes the rights of hundreds of thousands of migrant workers in one of the most important agricultural regions of the country and, if extended to other circuits, will affect hundreds of thousands more.

Moreover, by developing a new test for joint employment determinations, the Eleventh Circuit has rendered uniform enforcement of the important national policies behind the AWPA impossible. If different standards are permitted to develop for the imposition of substantive duties under the AWPA, employers not in compliance will stand to "gain a competitive advantage over those employers in full compliance with the various laws and regulations." *Report of the Comm'n on Agricultural Workers* at 138. This in turn will further frustrate the purposes of both the FLSA and AWPA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Petitioners also request that this Court invite the filing of a memorandum by the United States Department of Labor in this case.

Respectfully submitted,

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August 8, 1994

APPENDIX

Vergnaud AIMABLE; Alain Alcin; Gerta Alcin; Orasis Alcindor; Joseph Miguel Alcius, et al., *Plaintiffs-Appellants*,	)	No. 92-2749
v.	)	
LONG AND SCOTT FARMS; John Miller, Jr., *Defendants-Appellees*.	)	
Leclerc DENEUS; Charlonet Gue; Alphonse Amilcar; Marie Andre; Rosette Charles; Donald Ernest; Wilfride Jean Eugene, et. al., *Plaintiffs-Appellants*,	)	
v.	)	
LONG AND SCOTT FARMS; John Miller, Jr., *Defendants-Appellees*.	)	

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

May 10, 1994

Appeals from the United States District Court
for the Middle District of Florida.

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and HENDERSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

In this case, we must decide whether a farm, which contracted with a farm labor contractor to provide laborers to harvest its crops, was the "joint employer" of those laborers for purposes of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988), and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-72 (1988 & Supp. 1993). On cross-motions for summary judgment, the district court held that the farm was not the laborers' joint employer and entered judgment for the farm; the laborers appealed. We affirm.

I

Appellants (plaintiffs in two consolidated cases in the district court) are 206 migrant and seasonal farm workers.[1] At various times between 1985 and 1989, each alleges to have been employed by John Miller, Jr.,[2] to harvest crops grown by appellee Long & Scott Farms, Inc. ("Long & Scott"), the owner and operator of a 1,200-acre vegetable farm in Florida. Frank Scott, the owner of a one-half share in Long & Scott, managed the day-to-day operations of the farm.

John Miller is a farm labor contractor with whom Long & Scott dealt for twenty-five years. As a farm labor contractor, Miller agrees to provide workers to harvest farmers' labor-intensive crops. Miller then recruits the required number of laborers (sometimes from out-of-state locations; at other times from migrant camps, small towns, or other farms in Florida); he also provides many of the laborers with housing at his labor camp and/or transportation to the work sites.

During Long & Scott's relationship with Miller, Long & Scott used no other contractor to supply laborers for its corn, cabbage,

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[1] Although Congress separately defined "migrant" and "seasonal" agricultural workers, *see* 29 U.S.C. §§ 1802(8) & (10), the statutory distinction is without substance for purposes of this appeal.

[2] Miller, along with Long & Scott Farms, Inc., was a defendant in both district court cases; Miller, however, is not a party to this appeal. *See* note 4, below.

and cucumber crops. Miller, on the other hand, provided laborers to other farms, but only when that work would not interfere with his obligations to Long & Scott. During the period in question (1985-89), Long & Scott provided Miller with his largest single source of revenue. Nonetheless, because of Miller's other contracts, Long & Scott accounted for less than half of Miller's total revenue. Long & Scott paid Miller a flat rate, determined at the beginning of the produce season, for each quantity of produce picked. Similarly, Miller compensated most of his employees on a piece-rate basis.

Appellants filed these two suits against Miller and Long & Scott under the Fair Labor Standards Act ("FLSA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSAWPA").[3] After extended discovery, appellants and defendant Long & Scott filed cross-motions for summary judgment in both cases. The district court granted appellants' motions in part, holding that Miller was appellants' employer for purposes of FLSA and MSAWPA.[4] The district court, however, found that Long & Scott was not appellants' joint employer; thus,

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[3] Appellants' complaint also alleged violations by Miller under the Federal Insurance Contributions Act ("FICA"), 26 U.S.C. §§ 3101 *et seq.* (1988), and the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301 *et seq.* (1988). The district court has yet to rule on these allegations, so they currently are not before us.

[4] In finding that Miller was appellants' employer, the district court acknowledged that Miller disputed whether each of the 206 appellants had, in fact, worked for him. Because Miller's protestations created genuine issues of material fact as to certain laborers, the district court properly denied appellants' motion for summary judgment as to those contested individuals. Nonetheless, there was no issue of material fact as to the district court's larger holding: in general, Miller was appellants' employer. Miller has not contested this general holding either in the district court or on appeal.

Pending the resolution of Long & Scott's appeal, the district court stayed all proceedings in both cases concerning appellants' claims against Miller.

the district court denied appellants' motions for summary judgment to the extent they related to Long & Scott. Concurrently, the district court granted Long & Scott's cross-motions for summary judgment and subsequently entered final judgments in both cases in favor of Long & Scott. It is from these judgments that appellants appeal.[5]

II

In 1983, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act "to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers . . . and to assure necessary protections for migrant and seasonal agricultural workers. . . ." 29 U.S.C. § 1801. Among its many provisions, MSAWPA required that agricultural employers register with the government, maintain certain employment records for migrant and seasonal agricultural workers, and comply with sundry housing, transportation, and compensation provisions. *See* 29 U.S.C. §§ 1811-1844. If an employer fails to adhere to any of the provisions in MSAWPA (as well as to any of the regulations promulgated pursuant to it), MSAWPA creates a private right of action in federal court on behalf of all aggrieved persons; MSAWPA further empowers district courts to impose actual damages or statutory damages of $500 per plaintiff per violation. 29 U.S.C. §§ 1854(a) & (c).

Under MSAWPA, 29 U.S.C. § 1802(5), "employ" is defined by reference to FLSA: "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). *See also* 29 C.F.R. § 500.20(h)(1)

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[5] Our jurisdiction over this appeal from an adverse final decision rests on 28 U.S.C. § 1291 (1988). (The district court entered judgment in both cases pursuant to Fed.R.Civ.P. 54(b), thus permitting this appeal even though the resolution of appellants' claims against Miller is pending.)

Our review of the district court's grant of summary judgment is *de novo*, and we apply the same standards that bound the district court. *RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1459 (11th Cir. 1992).

(1992) (same definition). The MSAWPA concept of "employ" also "includes the *joint employment* principles applicable under the Fair Labor Standards Act." 29 C.F.R. § 500.20(h)(4). The regulations promulgated under MSAWPA define "joint employment" as follows:

> The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case.

29 C.F.R. § 500.20(h)(4)(i). The regulations also provide the Secretary of Labor (and thus, implicitly, the courts) with a means of determining whether joint employment is present:

> Questions will often arise under the Act as to whether individuals employed by a farm labor contractor are also jointly employed by another person engaged in agriculture (including any person defined in the Act as an agricultural employer or an agricultural association). Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. See *Hodgson v. Okada*, 472 F.2d 965 [(10th Cir. 1973)], *Hodgson v. Griffin and Brand*, 471 F.2d 235 [(5th Cir. 1973)], *Mitchell v. Hertzke*, 234 F.2d 183 [(10th Cir. 1956)], *United States v. Rosenwasser*, 323 U.S. 360, [65 S.Ct. 295, 89 L.Ed. 301 (1945)], *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 67 S.Ct. 1473 [91 L.Ed. 1772]] [(1947)], *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 [(9th Cir. 1979)], *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 [(5th Cir. 1975)], and *Usery v. Pilgrim Equipment Company, Inc.*, 527 F.2d 1308 [(5th Cir. 1976)]. In determining whether such a joint employment relation exists the courts have cited the broad definition of *employ* in the Fair Labor Standards Act which *includes to suffer or permit to work.* The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:

(A) The nature and degree of control of the workers;
(B) The degree of supervision, direct or indirect, of the work;
(C) The power to determine the pay rates or the methods of payment of the workers;
(D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
(E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii).[6]

Based on the findings of the district court, to which Miller acceded, it is undisputed that Miller was appellants' employer. As such, Miller was required to fulfill each of the statutory requirements imposed upon employers. MSAWPA simultaneously imposes obligations not only upon direct employers (such as Miller), however, but also upon a broad class of potentially liable persons, including "agricultural employers."[7] *See, e.g.*, 29 U.S.C. §§ 1821(a) & (d) (information and recordkeeping requirements), 1831(c) (recordkeeping), 1822(a) (payment of wages), 1832(a) (payment of wages), and 1841(b)(1) (transportation requirements). Thus, if appellants demonstrate that, through the principle of "joint employment," Long & Scott was their "agricultural employer," Long & Scott would have been obligated along with Miller to fulfill each of the requirements of MSAWPA and FLSA. Therefore, the issue before us, as before the district court, is whether Long & Scott was appellants' joint employer.

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[6] The definition of "joint employment" under FLSA is found in the regulations, 29 C.F.R. § 791.2 (1992).

[7] "The term 'agricultural employer' means any person who owns or operates a farm [or] . . . processing establishment, . . . and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker." 29 U.S.C. § 1802(2). *See also* 29 C.F.R. § 500.20(d) (1992) (same definition).

III

A

To determine whether an employer/employee relationship exists for purposes of federal welfare legislation, we look not to the common law definitions of those terms (for instance, to tests measuring the amount of control an ostensible employer exercised over a putative employee), but rather to the "economic reality" of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947) (construing distinction between employee and independent contractor status under FLSA); *Patel v. Wargo*, 803 F.2d 632, 635 (11th Cir. 1986) (analyzing joint employment under FLSA); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir. 1973) (same).[8]

Appellants posit a list of eleven factors to be considered as probative of economic dependency. Five are specifically outlined in the MSAWPA regulations ("the five regulatory factors"): 1) the nature and degree of control of the workers; 2) the degree of supervision, direct or indirect, of the work; 3) the power to determine the pay rates or the methods of payment of the workers; 4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; and 5) preparation of payroll and the payment of wages. 29 C.F.R. § 500.20(h)(4)(ii) (1992). The remaining six factors are filtered from various legal decisions: 6) investment in equipment and facilities; 7) the opportunity for profit and loss; 8) permanency and exclusivity of employment; 9) the degree of skill required to perform the job; 10) ownership of property or facilities where work occurred; and 11) performance of a specialty job within the production line integral to the business. *See, e.g., Griffin &*

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[8] Per *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), decisions of the Fifth Circuit adopted prior to close of business on September 30, 1981, are binding precedent upon us.

Brand, 471 F.2d at 237-38; *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Haywood v. Barnes*, 109 F.R.D. 568, 587 (E.D.N.C. 1986).

Appellants emphasize the third factor in arguing their economic dependency on Long & Scott: because Long & Scott effectively controlled the amount of money appellants could earn, appellants assert, they were economically dependent upon Long & Scott. The district court rejected this argument, concluding that appellants' theory of economic dependency was overbroad: even though Long & Scott necessarily determined how much work was available through its choices of how much land to own and which crops to plant, the court determined, that fact alone was insufficient to establish that Long & Scott was appellants' employer.

Long & Scott, however, contends that only the five regulatory factors are probative of the joint employment issue; this framework attempts to shift our inquiry away from economic dependency and toward questions of control. To this end, Long & Scott asserts that the latter six factors relate solely to employment relationships not here in question (for example, whether Miller is an independent contractor of Long & Scott). The district court largely adopted Long & Scott's arguments, limiting its examination to the five regulatory factors.

We believe that neither position is accurate.

B

To begin our analysis, we look first to the regulations adopted by the Secretary of Labor. In the definition of joint employment, § 500.20(h)(4)(ii) specifically states that the factors "to be used as guidance by the Secretary[] include, *but are not limited to*," the five regulatory factors. *Id.* (emphasis added). Further, the fact that the regulation makes reference to cases that considered factors in addition to the five regulatory factors reinforces our view that additional factors may be considered. Thus, we cannot accept Long & Scott's assertion that we should resolve the joint

employment issue solely on the basis of the five regulatory factors.

Nonetheless, not all of appellants' eleven factors should be given equal weight and, indeed, several of them are of no value insofar as they apply to factual circumstances not here present. Because the determination of joint employment is a question of law, *Patel v. Wargo*, 803 F.2d 632, 634 (11th Cir. 1986), we analyze *de novo* each of the eleven factors to determine which apply to the present case as well as to discern the direction in which each of the relevant factors points.

C

It is uncontroverted that the five regulatory factors are relevant to this case. What is disputed is whether the first three factors support appellants' contention that Long & Scott was their joint employer.[9] We address each factor in turn.

1. *The Nature and Degree of Control of the Workers.*

Appellants assert that two considerations indicate that Long & Scott's control of the workers confers joint employer status upon Long & Scott. First, appellants contend that Long & Scott made all planting decisions, including which crops to plant, how much to plant, and how to grow the crop (*e.g.*, decisions regarding tilling, fertilization, and irrigation). Second, appellants assert that Frank Scott made all decisions as to which parcels of land to harvest, when in the season to begin the harvests, and how frequently the fields should be harvested (since one parcel of land may be culled several times each season as plants continue to produce salable goods). Because Long & Scott made these decisions, it necessarily determined the amount of produce that could be harvested and, therefore, the exact amount of work available. Thus appellants conclude, they were economically dependent upon Long & Scott's agricultural decisionmaking.

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[9] As we discuss below, appellants acknowledge that the final two regulatory factors do not support a finding of joint employment.

Appellants' argument, however, misses the point. Although, at first glance, the first regulatory factor may appear to encompass abstract notions of control such as these, its focus is more properly limited to specific indicia of control (for example, direct employment decisions such as whom and how many employees to hire, whom to assign to specific tasks, and how to design the employees' management structure). In this case, Long & Scott did not directly control the number of workers hired to do the work; it did not demand that Miller hire (or fire) specific individuals; and, it did not select specific workers to do specific jobs. *Compare Mitchell v. Hertzke*, 234 F.2d 183, 190 (10th Cir. 1956) (finding no joint employment where farmer did not make similar employment decisions) *and Haywood v. Barnes*, 109 F.R.D. 568, 591 (E.D.N.C. 1986) (finding joint control where farmer selected workers for specific tasks and determined the number of workers hired). Rather, Long & Scott hired Miller to pick and pack a specified quantity of vegetables. It was Miller's responsibility to determine the necessary number of workers, to recruit those workers, and to compensate them for their labor. In short, Miller (independent of Long & Scott) exercised absolute, unfettered, and sole control over appellants and their employment.

Appellants allege that, even if Miller controlled hiring and firing, Long & Scott effectively controlled appellants' labor because Long & Scott directed Miller to pick certain fields on specified days.[10] We believe that Long & Scott's agricultural decisions -- decisions which only indirectly affected the number of workers necessary to harvest the land -- cannot be likened to "control" in the FLSA/MSAWPA sense. Long & Scott's business is growing and selling vegetables; Miller's business is providing a sufficient number of laborers to harvest those vegetables. It is not surprising that Long & Scott would (and, despite

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[10] Long & Scott submitted affidavits from Frank Scott and John Miller which asserted that Miller (with limited assistance from Long & Scott) determined which fields to pick. For purposes of this opinion, we will assume that Long & Scott not only possessed the power to determine which fields to pick but also periodically exercised that power.

FLSA/MSAWPA, should be able to) give general instruction to Miller as to which crops to harvest at a particular time. *See Howard v. Malcolm*, 852 F.2d 101, 104 (4th Cir. 1988) (finding no joint employment even though farmer advised contractor which portion of the crop to harvest). *Contra Haywood*, 109 F.R.D. at 589 (concluding assignment of plots to harvest indicative of control and supportive of ultimate finding of joint employment). Control arises, we believe, when the farmer goes beyond general instructions, such as how many acres to pick in a given day, and begins to assign specific tasks, to assign specific workers, or to take an overly active role in the oversight of the work. Such indica of control are not present here. *See Leach v. Johnston*, 812 F.Supp. 1198, 1203, 1207 (M.D.Fla. 1992) (finding farmer to be joint employer when, inter alia, he gave daily assignments to workers through crew leaders).

On the facts of this case, therefore, we find that the first regulatory factor does not support a finding of joint employment. Although Long & Scott, through it planting decisions, indirectly affected appellants' employment, that control was neither direct nor substantial. In sum, ultimate control, as well as the majority of picking decisions, rested in Miller, appellants' direct employer, not in Long & Scott.

2. *The Degree of Supervision, Direct or Indirect, of the Work.*

Appellants link the second regulatory factor, supervision, with the first factor, control, and argue that Long & Scott not only oversaw each day's production (as well as the post-picking task of grading the vegetables), but also issued commands to the workers through Miller.[11] (It is well-settled that supervision is present whether orders are communicated directly to the laborer or indirectly through the contractor. *Griffin & Brand*, 471 F.2d at 238.)

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[11] Although there is evidence that Long & Scott employees occasionally exercised some minimal supervision over a handful of appellants, all appellants acknowledged that Miller and his hired employees served as their direct supervisors and were directly responsible for overseeing their labor.

The record, even when taken in the light most favorable to appellants, establishes that any supervision by Long & Scott was de minimis. For instance, although eleven appellants aver that a Long & Scott employee came out to the field on a regular basis, the affidavits indicate that such employees rarely provided any direction to appellants' work. In addition, appellants place untoward reliance on a few affidavits stating that a Long & Scott employee occasionally gave Miller commands that were, in turn, relayed to an appellant; these examples of infrequent oversight are thus notable because they indicate that Long & Scott, except on rare occasions, left supervision and oversight of appellants entirely to Miller and his crew.

In short, we find that appellants' infrequent assertions of minimal oversight by Long & Scott do not rise to the level of supervision necessary to satisfy this factor. For instance, in *Griffin & Brand*, the putative employer's field supervisors were constantly in the field giving commands to contractors; this contributed to the court's finding of joint employment. 471 F.2d at 238. Similarly, the facts in *Haywood* indicated direct and continuous supervision on the part of the joint employer. 109 F.R.D. at 590. Although the record indicates the presence of some minimal supervision by Long & Scott, appellants have not demonstrated a degree of supervision sufficient to confer joint employment status.

3. *The Power to Determine the Pay Rates or Methods of Payment.*

Appellants rely most heavily on the third regulatory factor, contending that Long & Scott indirectly controlled their rate of pay. Appellant's argument follows the transitive property of geometry: first, Long & Scott controlled the amount Miller received; second, Miller controlled the amount appellants received; therefore, Long & Scott controlled the amount appellants received. This relationship is validated, appellants assert, by Miller's refusal to pay appellants more money unless he received more money from Long & Scott. To summarize, because of Miller's intransigence regarding pay increase,

appellants conclude that they were economically dependent upon -- and thus employees of -- Long & Scott.

Unfortunately for appellants, the laws that bind the Euclidian world do not apply with equal force in federal employment law; appellants' leap of logic is unfounded. The record clearly indicates that Miller negotiated the terms of his compensation at arms' length, employing every method possible to win annual increases from Long & Scott. Then, Miller took the revenue he earned from Long & Scott (as well as the revenue he garnered from other employers, who contributed more than half of his income) and independently determined how best to spend it. Miller alone determined what portion of his revenue to expend on labor, housing, and equipment. Most importantly, Miller, not Long & Scott, determined what wages to pay appellants; which workers to pay on a piece-rate basis and which to pay on hourly basis; and when (and if) to increase the workers' wages (either by charging farmers more, decreasing the number laborers, or reducing his expenses or his profit). Long & Scott had no direct or indirect power to set or increase appellants' wages; in fact, even if Long & Scott were to pay Miller more money on his contract (with the intent that Miller use the extra money to increase appellants' wages), Miller would have been free to retain the increase rather than raise appellants' wages; Long & Scott could not influence this decision. The evidence is clear: Miller possessed exclusive control over appellants' compensation, and appellants were economically dependent solely on Miller.

Moreover, a review of other cases establishes that, despite appellants' arguments, the third regulatory factor does not lead to a finding of joint employment in the present case. For instance, in *Haywood*, in which the court found joint employment, the farmer specifically determined the amount of pay and the method of payment. 109 F.R.D. at 591. Similarly, in *Griffin & Brand*, the old Fifth Circuit Court of Appeals, in finding joint employment, noted that the farmer set the workers' pay, determined whether to pay on an hourly or piece-rate basis, and deducted Social Security contributions. 471 F.2d at 238. *Contra*

Leach, 812 F.Supp. at 1203 (finding that flat fee paid to labor contractor indicated control of workers' pay).

4. *The Right, Directly or Indirectly, to Hire, Fire, or Modify the Employment Conditions of the Workers.*

Appellants concede that the fourth regulatory factor favors a finding that no joint employment existed. The evidence in the record demonstrates that Long & Scott never mandated that a particular individual be hired or fired; that Long & Scott never shifted a worker from one pay classification (hourly or piece-rate) to another; that Long & Scott never shifted a worker from one task to another; and, that Long & Scott never dictated the hours that any given employee could work. We agree with both parties and find that this factor, like control, supervision, and pay, does not support a finding of joint employment.

5. *Preparation of Payroll and Payment of Wages.*

Appellants also concede that the fifth regulatory factor does not support a finding of joint employment. Miller was responsible for calculating each of his employees' wages as well as for paying those wages; Long & Scott did not participate at all in this operation.

The district court largely limited its analysis to these five regulatory factors. As we have demonstrated, each factor leads to the conclusion that appellants were economically dependent upon Miller, not upon Long & Scott. If these factors are taken in isolation, the result is inescapable: Miller alone was appellants's employer; no joint employment existed.

D

Appellants contend, however, that six other factors must be taken into consideration; each factor, appellants assert, mandates a finding that Long & Scott was indeed a joint employer. Again, because our review is *de novo*, we will examine independently each factor in resolving two issues: whether the factor is relevant to this case; and, if so, whether it supports a finding of joint

employment. We find that only the last two are relevant to our inquiry.

1. *Investment in Equipment and Facilities.*

Appellants derive the first non-regulatory factor from *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). In that case, farm workers brought suit against Driscoll Strawberry Associates ("DSA") for failure to comply with FLSA; there was no farm labor contractor involved. In defending against the FLSA suit, DSA claimed that the workers were independent contractors, not employees, and that FLSA therefore did not apply. Thus, this factor (as with the next three non-regulatory factors) was not used to determine joint employment status (which was not an issue), but rather to determine whether workers were employees or independent contractors.[12]

We believe this factor not relevant to our decision. It is apparent that appellants indeed were employees, not independent contractors; they have little or no investment in any equipment. If we were to apply this factor, however, it would not indicate who appellants' employer was, as both Miller and Long & Scott made significant investments in equipment and facilities. Indeed, while Long & Scott invested in the mule train (a machine used in the picking of corn), crates, and facilities, Miller invested in trucks, a labor camp (in which many appellants lived), and tools. Thus, while the factor does not exonerate Long & Scott, neither does it demonstrate that appellants were economically dependent upon the farm. We therefore exclude it from our analysis.

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[12] Significantly, in cases in which the Ninth Circuit Court of Appeals has had to address joint employment issues, it has not adopted the *Real* factors, but instead has limited itself to the five regulatory factors addressed above. *See, e.g., Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

2. *The Opportunity for Profit and Loss.*

The second non-regulatory factor asks whether, through their own initiative or managerial skill, appellants had the opportunity of realizing profit. As Long & Scott concedes that appellants had no opportunity for profit or loss, appellants contend that appellants were economically dependent upon -- and thus employees of -- Long & Scott.

As with the first non-regulatory factor (investment), this test does not assist our analysis; it, too, is used to determine whether an individual is an independent contractor or an employee. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947); *Real*, 603 F.2d at 754; *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976). Thus, although this factor would indicate that appellants were not independent contractors (a not unsurprising conclusion), it would not assist us in determining whether Long & Scott was appellants' joint employer. We therefore exclude it from our consideration as well.

3. *Permanency and Exclusivity of Employment.*

Appellants argue that the third non-regulatory factor indicates joint employment status for two reasons: first, because Miller worked with Long & Scott for twenty-five years; and second, because, during the harvest season, appellants' employment was permanent and exclusive. *See Haywood*, 109 F.R.D. at 588-89. As to the first argument, the fact that Miller, an independent contractor, worked for Long & Scott for a period of years has no bearing on the question of whether his employees were employed jointly by Long & Scott.

As to the second argument, Long & Scott responds by arguing that many appellants worked for other farms during the years in question and that more than one-half of Miller's income derived from work performed for other farmers. We find, however, that both parties' arguments miss the mark. During the harvest periods at Long & Scott, appellants' work, which largely was exclusive, had the hallmarks of employment. The factor seems

to indicate, however, that *Miller* was appellants' *sole* employer, as appellants worked exclusively and permanently for him not only during harvest seasons at Long & Scott, but also during harvest seasons at other farms.

Thus, this factor is irrelevant to our discussion. While it reiterates what we have already concluded -- that appellants were employees, not independent contractors -- it nonetheless fails to demonstrate that Long & Scott was appellants' joint employer. (In fact, contrary to appellant's assertion, it appears to indicate that appellants were employees solely of Miller).

4. *The Degree of Skill Required to Perform the Job.*

As to the fourth non-regulatory factor, appellants assert that, since little or no skill is required to harvest vegetables, appellants were economically dependent upon -- and thus employees of -- Long & Scott. *See Haywood*, 109 F.R.D. at 588; *Real*, 603 F.2d at 754. As with the first three non-regulatory factors, however, this factor is not relevant as it shows that appellants were employees, but not of whom.

5. *Ownership of Facilities where Work Occurred.*

The fifth non-regulatory factor is the first additional factor appellants cite whose relevance is not limited to the employee/ independent contractor distinction. *See Griffin & Brand*, 471 F.2d at 237. *See also McComb*, 331 U.S. at 730, 67 S.Ct. at 1477. It also is the first factor that favors appellants. There is no dispute that appellants worked on land owned by Long & Scott.

6. *Performance of a Specialty Job Integral to the Business.*

Appellants' sixth and final non-regulatory factor also is derived from *Griffin & Brand*, 471 F.2d at 238. *See also, McComb*, 331 U.S. at 730, 67 S.Ct. at 1477. Since appellants performed a line-job integral to the harvesting and production of salable vegetables, we conclude that this factor also supports appellants.

Thus, we find that four of appellants' six non-regulatory factors are irrelevant to this case. And, therein lies a caution:

Courts must closely scrutinize such factors to determine their relevancy to each particular situation. Although many factors may be useful in other FLSA/MSAWPA situations, they are not necessarily useful in all such situations and are of no value to joint employment determinations.

E

In conclusion, although the only two relevant non-regulatory factors favor appellants, we find that the five regulatory factors (all of which strongly indicate that this was not a joint employment situation) demonstrate that appellants were not economically dependent upon -- and thus not employees of -- Long & Scott.

IV

Appellants insist that a determination of joint employment requires the court to sift through eleven separate factors, five found in the regulations under MSAWPA and six derived from other sources.[13] Facially, appellants argument is attractive: the regulation specifically states that our deliberations "are not limited to" the five regulatory factors. 29 C.F.R. § 500.20(h)(4)(ii).

We believe, however, that our inquiry permissibly may be limited to *probative* factors. It is telling that no other court has adopted each of appellants' proposed factors in one case. The reason: not all factors are relevant in every case.

In this case, the district court determined that only the five regulatory factors were relevant to the question at issue: whether Long & Scott was appellants' joint employer. As our analysis above indicates, that determination largely was correct. Four of appellants' six non-regulatory factors indicate that appellants were economically dependent upon someone; they do not, however, tell us upon whom they were dependent and thus are not relevant to our analysis. Only the last two non-regulatory factors,

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[13] If we were to agree with appellants, this case would displace *Haywood* (which had nine factors) as the case with the greatest number of factors.

factors which bear little relative weight, favor appellants. Thus, when we examine these non-regulatory factors in light of the five regulatory factors, each of which demonstrates that appellants were economically dependent solely upon Miller, we conclude that Long & Scott was not appellants' joint employer.

The judgment of the district court therefore is

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

VERGNAUD AIMABLE, et al., *Plaintiffs*,	)	CASE NO. 89-96-Civ-Oc-10
vs.	)	
LONG AND SCOTT FARMS INC. and JOHN MILLER, JR., *Defendants*.	)	
LECLERC DENEUS et al., *Plaintiffs*,	)	
vs.	)	
LONG AND SCOTT FARMS, INC. and JOHN MILLER, JR., *Defendants*.	)	

ORDER

Before the Court are the following motions:[1]

1. The Plaintiffs' motion (Doc. 105) for partial summary judgment. The Defendants have responded (Docs. 122 & 128).

2. Long & Scott Farms, Inc.'s (Long & Scott) motion (Doc. 107) for summary judgment. The Plaintiffs have responded (Doc. 126).

[1] These two cases involve the same issues of fact and law and were consolidated pursuant to M.D.Fla. Rule 1.04(b) by Order (Doc. 117) entered 3 January 1991. The motions, supporting memoranda, and responses thereto that are before the Court are identical in each case. The docket numbers used in this Order are those of 89-96-Civ-Oc-10.

I have determined that there is no genuine issue as to any material fact so that summary judgment is appropriate under Rule 56, Fed.R.Civ.P. While the parties debate the inferences and conclusions to be drawn from the facts, the facts themselves are clearly established.

Defendant Long & Scott is a corporate farmer. During the years 1985-1990, Long & Scott contracted with Miller to provide farm labor to pick, grade and pack its vegetables and deliver them to its sales cooler. Miller, a farm labor contractor, recruited, hired, employed, supervised, transported and furnished hundreds of migrant farm workers to Long & Scott. Additionally, Miller housed many of the workers in camps which he owned.

Miller and Long & Scott negotiated, at arms length, contracts that required Long & Scott to pay Miller piece rates based upon the quantity of saleable vegetables delivered to Long & Scott's cooler. Miller in turn paid his workers wages based upon lower rates. Miller kept the difference to pay overhead expenses and as profit. It is undisputed that the difference amounted to about fifty percent of what Long & Scott paid Miller, or approximately $500,000.00 per year.

Long & Scott provided Miller the location of the fields, a planting schedule, and information on the volume of vegetables needed at the cooler at a given time. Miller, with input from Long & Scott, made the ultimate decision on which field to pick and how often to pick it. He also decided what size crew to use and when they would begin and end the working day. Long & Scott constructed specialized equipment which was used in the fields. Accordingly, Miller did not use the equipment that he owned. However, he did own and use a fleet of vehicles for transporting workers to and from the fields. He also operated a repair facility where he maintained his vehicles.

Long & Scott provided Miller with one employee, Petty, who drove the "mule train" which was used to harvest corn. Miller supervised Petty. Otherwise, there were no Long & Scott employees in the fields when Miller was picking them, except on those occasions when messages were sent to Miller. Miller, or

his subordinates, supervised his employees. He decided who to hire and who to fire. He disciplined his own workers. Miller prepared all of the workers' payroll records. He made deductions for taxes and he paid the workers. Long & Scott played no role in these areas.

About 40 of the 223 Plaintiffs state in answers to interrogatories that someone from the "company" occasionally came out to the fields and relayed information to Miller or his subordinates. Less than twelve state that they were "yelled at" after the company man left. These few statements are insufficient to create a genuine issue of fact concerning the supervision of the workers.

The amended complaint (Doc. 36) contains numerous counts against both Defendants for alleged violations of the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. §§ 1801, et. seq., and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201, et. seq. The Plaintiffs also allege that Defendant Miller failed to pay Social Security and Unemployment Compensation taxes in violation of the Federal Insurance Contributions Act (FICA) 26 U.S.C. §§ 3101, et. seq., and the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301, et. seq.

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F. R. Civ. P. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party." *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the

'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, supra at 2553.

In order for Long & Scott to be liable under either MSAWPA or FLSA, it must have been the Plaintiffs' "employer" as that term has been construed under FLSA.[2] The determination of whether Long & Scott was the Plaintiffs' employer is ultimately a legal one, to be supported by subsidiary factual findings. *Patel v. Wargo*, 803 F.2d 632, 634 (11th Cir. 1986).

The Plaintiffs contend that Miller and Long & Scott were their joint employers. Miller does not dispute that he was an employer as construed under the FLSA; Long & Scott does. The Secretary of Labor has determined that the following factors are significant in determining whether a joint employment relationship exists:

(A) The nature and degree of control of the workers;
(B) The degree of supervision, direct or indirect, of the work;
(C) The power to determine the pay rates or the methods of payment of the workers;
(D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
(E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4)(ii).

Applying the Factors

(A) & (B) Long & Scott had no control over the employees. It played no role in the hiring, firing or supervising of the employees. The number of Plaintiffs who stated in interrogatories that men from the "company" occasionally came out to the fields does not raise a genuine issue of material fact on the issue of supervision. Miller ultimately decided which fields the workers picked, how many would pick there, for how long and how often. Miller prepared the workers' payrolls, deducted taxes and paid the

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[2] MSAWPA incorporates the definition of "employ" found in FLSA. 29 U.S.C. § 1802(5).

workers. Miller also housed and transported many of the workers. On the other hand, Long & Scott provided almost all of the tools and equipment used by the workers in the field.

(C) Miller had the power to determine the pay rates and the method of payment of the workers. It is undisputed that his payroll was approximately one half of his gross revenue from Long & Scott. He could have paid his workers more or less and could have used a different method of payment if he chose to. Long & Scott played no role in this area. If it had paid Miller more money or paid him by a method other than piece rate, there is no indication that Miller would have paid his employees any differently.

(D) Miller alone had the right to hire, fire, or modify the employment conditions of the workers.

(E) Miller alone prepared the worker's payroll and paid the workers.

After applying these relevant factors it is clear that Long & Scott was not the workers' joint employer. The Plaintiffs cite cases which involve the issue of whether a purported farm labor contractor was himself an independent contractor or an employee of the farmer. Here it is undisputed that Miller was an independent contractor and not an employee of Long & Scott's.

The Plaintiffs also argue that the ultimate test regarding the existence of a joint employer relationship is one of "economic reality" and the degree of "dependency" of the workers upon the farmer. But the workers are always dependent on the farmer in an economic sense, and if the workers here were Long & Scott's employees, then it is fair to say that all farm laborers recruited by farm labor contractors would be employees of the farmers on whose farm they work. If Congress had intended that result in enacting the new statute in 1982, it could have said so; but it did not, opting instead to borrow the more limited reach of the joint employer jurisprudence under the FLSA.

Long & Scott's motion for summary judgment is due to be granted on the employment issue.

The Plaintiffs also move the Court to find that Miller was: 1) their employer for purposes of their FLSA, FICA, FUTA claims, and 2) a farm labor contractor and an owner/operator of housing for purposes of their MSAWPA claims. Miller does not dispute that he was any of these things in general. However, in his affidavit he states that several of the Plaintiffs never worked for him, and accordingly, there is an issue of material fact as to whether Miller occupied any of those relationships with regard to those Plaintiffs. Miller does not dispute the application of the statutes with regard to the remainder of the Plaintiffs. Accordingly, they apply to Miller for purposes of those Plaintiffs' claims.

Long & Scott also moves for summary judgment with respect to the claims made pursuant to 29 U.S.C. § 1842. The Plaintiffs concede that Long & Scott's motion is due to be granted in this regard.

Upon due consideration:

1. The Plaintiffs' motion (Doc. 105) for partial summary judgment is GRANTED, to the extent that the Court finds Miller to have been the employer of the Plaintiffs which he does not dispute having employed. The motion is otherwise DENIED. A list of Plaintiffs, broken down by those that Miller does and does not dispute having employed, is attached as Appendix A.

2. Long & Scott's motion (Doc. 107) for summary judgment is GRANTED in its entirety. Further, pursuant to Rule 54(b), Fed.R.Civ.P., there is no reason for delay in the entry of final judgment and the Clerk is therefore directed to enter judgment in favor of Long & Scott Farms, Inc., and against the Plaintiffs, with costs to be assessed according to law.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 30th day of June, 1992.

/s/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE